A Final Bow From Miscimarra Lessens Employer Bargaining Obligations

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Thomas C. Payne
Associate

On the eve of Chairman Philip Miscimarra's departure, the National Labor Relations Board (NLRB) remained busy. In *Raytheon*, the board undid another Obama-era decision that reversed decades of NLRB precedent. This decision overturned a 2016 decision and held that where an employer makes modifications to terms and conditions of employment similar in kind and degree with an established past practice consisting of comparable unilateral modifications, they owe the union no notice or duty to bargain over the modifications. The board overturned 50 years of precedent in their 2016 decision. They held that modifications made pursuant to past practices were still "changes" under board law when they were created under a management-rights clause in a collective bargaining agreement (CBA) that had expired or when they involved company discretion. As a unilateral change, the company was required to provide the union with notice and an opportunity to bargain. Raytheon Co. established a past practice of making unilateral modifications to its healthcare benefits in January each year from 2001 to 2012. After the parties' CBA expired in 2012, Raytheon made the same modifications in January 2013, which led to the union filing unfair labor practice charges. The board analyzed Raytheon's changes under board law as it stood prior to 2016 and concluded that the modifications were a continuation of Raytheon's past practice involving similar unilateral changes. The board said the one-year-old decision from the Obama-era was "fundamentally flawed" and that it "cannot be reconciled with the board's responsibility to foster stable bargaining relationships." Further, they said the previous decision "distorts the long-understood, commonsense understanding of what constitutes a 'change,' and it contradicts well established board and court precedent." The Obama-era decision was one of those that overruled decades of precedent and included a dissent from Miscimarra, thus it was one of those decisions identified by new General Counsel Peter Robb's memo that outlined areas the board would be looking into in the future. What this means for employers is that they can again rely on past practice to implement modifications without the fear of having a bargaining violation. The decision has particular effect on situations just like that in *Raytheon*, where yearly changes to health and benefit plans are complicated because of an expired contract. Employers no longer have to worry that board law will keep them from making modifications that they made in years past.

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